

91-467

Supreme Court, U.S.  
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

CHARLES B. ELBAUM,

*Petitioner,*

vs.

EBSCO INDUSTRIES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

DAVID B. ANDERSON  
VINCENT R. LEDLOW  
(*Counsel of Record*)

WALSTON, STABLER, WELLS,  
ANDERSON & BAINS  
505 20th Street North  
Birmingham, Alabama 35203  
(205) 251-9600

*Attorneys for EBSCO Industries, Inc.*

**QUESTION PRESENTED**

Under the circumstances of this case, where service is contested by equivocal and inconclusive affidavits, where those affidavits are impeached by prior inconsistent statements, and where those affidavits are contradicted by other competent testimony, **did** the District Court apply any presumption, rebuttable or not, in favor of the return on service by a professional process server, such that an important issue of federal law involving the application of such a presumption must be determined by this Court.

**PARTIES TO THE PROCEEDING**

Marina Capital Corporation, a shell corporation owned and controlled by Petitioner Charles B. Elbaum ("Elbaum"), was a defendant in this action when it was before the district court. Marina Capital was served, defaulted, and did not appeal the entry of the default judgment to the circuit court of appeals. Consequently, Marina Capital was not joined in Elbaum's petition.

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**BRIEF OF RESPONDENT**

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**INTRODUCTION**

Contrary to the factually incorrect assertions of Elbaum, the district court in this case possessed ample evidence from several sources to conclude that service upon Elbaum was effectively made without applying any presumption in favor of the return on service by a professional process server. As such, and as demonstrated below, Elbaum was not deprived of any effective right to challenge service, and there is no reason for this Court to

consider a constitutional challenge to an evidentiary presumption, rebuttable or not, which Elbaum cannot demonstrate formed the basis for the decision of the district court and which the record reveals was unnecessary to reach a determination that service was effective.

### STATEMENT OF THE CASE

Noticeably absent from the Petition for a Writ of Certiorari is the fact that this action arose out of fraudulent misrepresentations made by Elbaum to Respondent EBSCO in Birmingham, Alabama in order to procure printing services for a shell company of which Elbaum was the alter ego. These misrepresentations, which were relied upon by EBSCO in extending over \$100,000 in credit, formed the basis for the Complaint herein (R1-1).

Service of the initial summons and complaint could not be obtained upon Elbaum in Tempe, Arizona because Elbaum had collapsed his company, was in the process of getting divorced, and had left the house where he had once lived with his wife. Marina Capital was served with the initial summons and complaint at the Tempe, Arizona home of Elbaum's wife, who was also an officer of Marina Capital (R1-2). Although Elbaum argued to the district court that he lived at this home, his company, nevertheless defaulted in this action (R1-4). Having obtained information that Elbaum was living with his parents in Pittsburgh, Pennsylvania, EBSCO retained a professional process server and served Elbaum by leaving the alias summons and complaint with Elbaum's mother at the house where Elbaum was then residing (R-1-3). It is undisputed that Mrs. Elbaum was a person of suitable age

and discretion then residing therein. The question eventually presented to the United States District Court for the Northern District of Alabama for determination was whether Elbaum's parents' house in Pittsburgh was his dwelling house or usual place of abode in December of 1983.

When EBSCO located Elbaum in New York several years later (in 1990), Elbaum, although he claims that he was living at his wife's house where the initial summons and complaint were served, contended he had never received the summons and complaint, and sought to set aside the judgment as void for insufficient service of process (R1-12 and R1-16). In support of his motion, Elbaum filed two affidavits (R1-13 and R1-14) executed by him and one affidavit (R1-15) executed by his mother. EBSCO filed a verified response to the motion setting forth the testimony of Elbaum's wife, the testimony of Elbaum's father-in-law, the testimony of other individuals, and other evidence contained in the court's file. EBSCO also presented prior recorded and inconsistent statements of Elbaum which impeached Elbaum's affidavits (R1-19). Contrary to the statements contained in Elbaum's brief to the effect that this case presents a simple swearing match between Elbaum and the process server, the record before the district court contained the following evidence:

1. A proper return on service by a professional process server stating that service was made upon Mrs. Elbaum in Pittsburgh on December 13, 1983 (R1-13).

2. Marina Capital Corporation, a co-defendant, was served with the initial summons and complaint at Elbaum's wife's house in Tempe, Arizona, where Elbaum contends he was living at the time (R1-2 and R1-13).



3. Elbaum was at his parents' house in Pittsburgh in November of 1983 (R1-19, ¶ 3).

4. Elbaum did not live with his wife in Arizona after the first week in October 1983 (R1-19, ¶ 2, Exh. A).

5. Mrs. Elbaum cannot remember whether or not she received the summons and complaint in December of 1983 (R1-15). Contrary to the assertions made in the petition, Elbaum's mother never stated she did not receive the summons and complaint.

6. In January of 1984, Elbaum was using his parents' address in Pittsburgh as his residence address (R1-19, Exh. B).

7. In June of 1984, using his parents home as his address, Elbaum wrote a letter to the Honorable Seybourne H. Lynne, United States District Judge, advising the district court (in connection with a notice of pretrial conference which he had received) that he and his company, Marina Capital, were "not amenable to service in this action" and that he did not intend to defend the action for his company or for himself (R1-19, Exh. C). In effect, Elbaum admitted actual service, but stated that he would not appear and defend, because he believed no personal jurisdiction existed for torts committed in Alabama, *not* because he had not been served.

8. Elbaum's 1990 affidavit concerning the background of certain business transactions which occurred in 1982 (R1-14) was inconsistent in several material respects with prior recorded statements of Elbaum made in 1982 (R1-19, ¶¶ 11-18).

9. In one of the affidavits submitted in support of his motion for relief from judgment, Elbaum admits he resided with his parents in April of 1984 and thereafter, but claims he lived with his wife in Tempe, Arizona in De-

cember of 1983, but never saw the summons and complaint (R1-13). If it is true that Elbaum was living with his wife, which EBSCO contends it is not, then Elbaum actually received the initial summons and complaint in this action, because it is undisputed that the initial summons and complaint was properly served upon Marina Capital at Elbaum's wife's residence in Tempe, Arizona, Elbaum's wife being an officer of that corporation. Thus, Elbaum's affidavit (R1-13) is not only inconsistent with prior statements, but is internally inconsistent.

The evidence presented by Elbaum did not directly controvert the return on service. The affidavits filed on behalf of Elbaum were equivocal and were inconsistent with other testimony and prior recorded statements of Elbaum which were also before the District Court. Based upon the complete record and *not* on some presumption which is not even mentioned in its Order, the District Court determined Elbaum had been properly served. The Eleventh Circuit affirmed the decision of the District Court and refused to reconsider its decision.

### SUMMARY OF ARGUMENT

The district court was presented with ample evidence from which to conclude that Elbaum had been properly served. The evidence presented by Elbaum in controversion of service was internally inconsistent, inconsistent with other testimony, and inconsistent with prior recorded statements by Elbaum. As such, the court was not faced with contradicting evidence of equivalent probative value which it was then required to resolve using any presumption. Therefore, there is no constitutional issue for this Court to resolve. Elbaum has had his

evidentiary hearing and appellate review of the underlying facts. The judgment of the district court is due to stand.

### ARGUMENT

The foregoing statement of the case demonstrates that the district court considered testimony from at least six different sources when it determined Elbaum had been properly served. This is not a case where the district court, presented only with a directly controverted return on service, applied a presumption to deny that contest. In fact, there was no evidence before the court of appeals and there is no evidence before this Court that the district court applied any presumption in favor of the return on service by the professional process server.

In *Frof v. Harris*, 695 F. Supp. 827 (E.D.Pa. 1988) the Court held that more than an affidavit that service did not occur was required to rebut the presumption in favor of service by a process server. In *Frof* the defendants' affidavit directly controverted the return on service. *Frof* at 828-829. It is this presumption and its application where service is directly controverted by competent testimony that Elbaum contends violates due process; however, in the instant case and as shown above, Elbaum failed to directly controvert the return on service. He submitted equivocal and internally inconsistent affidavits, which EBSCO then impeached by other competent testimony and by prior inconsistent statements of Elbaum himself (which he had apparently forgotten).

The presumption described in *Frof* was not required to be applied in this case and, as reflected by the order of the district court, such presumption was not actually ap-

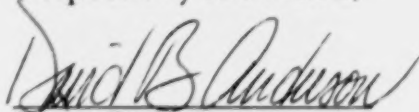
plied in this case. There is no special and important reason for this Court to grant the Petition for a Writ of Certiorari, since there is no evidence before the Court directly controverting service or establishing any application of any allegedly unconstitutional presumption in favor of the return of service.

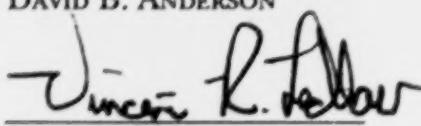
### CONCLUSION

Inasmuch as Elbaum has not controverted and cannot directly controvert service of process, no presumption, rebuttable or not, in favor of the return on service was required to be applied by the district court. The Petition of Writ of Certiorari is, therefore, due to be denied.

Dated: October 16, 1991.

Respectfully submitted,

  
DAVID B. ANDERSON

  
VINCENT R. LEDLOW  
(Counsel of Record)

WALSTON, STABLER, WELLS,  
ANDERSON & BAINS  
505 20th Street North  
Birmingham, Alabama 35203  
(205) 251-9600

*Attorneys for EBSCO Industries, Inc.*

**CERTIFICATE OF SERVICE**

I certify that three (3) copies of this above and foregoing Brief of Respondent has been served upon counsel for the petitioner by placing them in the United States mail, properly addressed and postage prepaid, as follows:

Edward L. Smith

Attorney for Petitioner Charles B. Elbaum

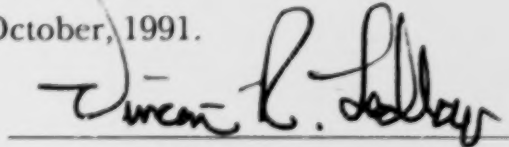
Hollyer, Jones, Brady, Smith, Troxell,

Barrett & Chira

342 Madison Avenue, Suite 1818

New York, New York 10173

This the 6<sup>th</sup> day of October, 1991.

A handwritten signature in black ink, appearing to read "Vincent L. Lally", is written over a horizontal line.

Of Counsel